CHAN KAY SIEW & ORS v. CHOO BAN HONG & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
TENGKU MAIMUN TUAN MAT JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: Q-02-2454-10-2012]
10 JUNE 2016

CONTRACT: *Agreement – Loan – Borrower obtained loan from lender and executed memorandum of charge over lands – Memorandum of charge for land stated that loan to be repaid within one year – Memorandum of charge varied by memorandum of variation charge – Memorandums showed that there was no interest charged – Interest not stated as income tax would be payable in interest even though amount had not been received – Whether omission of any reference to interest constituted tax evasion – Parties agreed in letter to pay interest – Whether letter admissible – Whether contract valid – Evidence Act 1950, s. 91 – Contracts Act 1950, s. 24*

The original plaintiff had, prior to the High Court decision, passed away and her sons, who were appointed as co-executors and trustees of her estate, had been substituted in her stead. The original plaintiff was the sister of the first appellant ('the first defendant'). The second and third appellants were the first defendant's daughter and son-in-law, respectively. In 2000, the plaintiff obtained a loan in the sum of RM1,430,000 ('the loan') from the defendants and as security for the loan, she executed a memorandum of charge ('MOC') over two pieces of land ('the land'). Under the MOC, the loan was to be repaid within one year from the date of the execution and there was no interest charged. The MOC was varied by way of a memorandum of variation charge ('MOVC') and interest rate was not applicable. Sometime in 2011, the plaintiff's sons approached the defendants to settle the loan and to discharge the charge of the land. The defendants showed them a statement with a redemption sum of RM4,079,956.88. The plaintiff insisted that the amount to be repaid was only RM1,430,000 and proceeded to file an originating summons ('the OS') at the High Court for a declaration to that effect. In opposing the plaintiff's OS, the defendants counterclaimed that (i) the loan was only interest-free so long as it was paid within one year; (ii) when that period of one year was exceeded, interest was payable as agreed by the plaintiff herself in a separate document ('the letter'); (iii) the amount stated in the MOC was the loan given to discharge an earlier charge on the land as well as the amount of various loans given to the plaintiff and her husband over the years; and (iv) interest was not stated in the MOC and MOVC as income tax would be payable in the interest even though the

amount had not been received. On the other hand, the plaintiff submitted that (i) the section marked 'Interest Rate' in the MOVC had the words 'Not Applicable' typed in; and (ii) the omission of any reference to interest in the MOC and MOVC constituted tax evasion and made the contract illegal. The High Court Judge ('the HCJ') allowed the plaintiff's application and dismissed the defendants' counterclaim for the payment of interest. Citing s. 91 of the Evidence Act 1950, the High Court Judge held that (i) in determining the terms of the contract between the parties, the court was permitted to have regard only to the terms contained in the MOC and MOVC; (ii) the letter could not be relied upon by the defendants to prove that the plaintiff agreed to the payment of interest; and (iii) by omitting any mention of interest in the MOC and MOVC, the defendants were avoiding tax and this rendered the contract illegal. Hence, the present appeal. The issues that arose for the court's determination were (i) whether the MOC and MOVC were the only documents admissible; (ii) whether the agreement was valid; and (iii) when was interest due and payable.

Held (order accordingly)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The words in the MOVC merely reflected the fact that the MOVC was only varying the period for the repayment of the loan amount stated in the MOC. The other terms of the MOC remained in force. The letter was admissible to show that there was an agreement to pay interest. Reading the MOC and the letter together, it would appear that the agreement between the parties was in fact contained in that letter as well as in the MOC. In other words, the MOC did not constitute the totality of the agreement reached by the parties. The agreement in the letter to pay interest continued to be in force. Therefore, all the documents, namely the MOC, the MVOC and the letter, were admissible. (paras 30, 36, 37 & 39)

(2) It was not that the defendants wanted to avoid payment of tax *per se* or altogether but they wanted to avoid paying tax on income which had not been received. The contract between the parties, as embodied in the three documents, was not tainted with illegality so as to attract the operation of s. 24 of the Contracts Act 1950. There was a valid contract between the parties for the payment of interest of 10% per annum on the loan, as evinced by the letter. (paras 41 & 44)

(3) The court could not ascertain the date of discharge. It was only when the plaintiff filed the OS for a declaration of the amount of the redemption sum that, the defendants counterclaimed, seeking an order for the repayment of interest for as long as the charge was not discharged by payment of the principal sum, interests and costs. By the time the appeal came to the court, the charge was already discharged by payment

of the principal sum. What was left unpaid was the interest. The High Court order was varied only in relation to the interest. (paras 53, 54, 55 & 56)

Bahasa Malaysia *Headnotes*

Plaintif asal telah, sebelum kesnya di Mahkamah Tinggi diputuskan, meninggal dunia dan anak-anak lelakinya dilantik sebagai pentadir bersama dan pemegang amanah pusakanya, menggantikan plaintif. Plaintif asal dan perayu pertama ('defendan pertama') adalah adik-beradik. Perayu kedua dan ketiga adalah, masing-masing, anak perempuan dan menantu lelaki defendan pertama. Pada 2000, plaintif memperoleh pinjaman berjumlah RM1,430,000 ('pinjaman') daripada defendan-defendan dan sebagai cagaran bagi pinjaman tersebut, dia memeterai satu memorandum pajakan ('MOC') bagi dua bidang tanah ('tanah'). Bawah MOC, pinjaman perlu dibayar balik dalam masa satu tahun dari tarikh pelaksanaan dan faedah tidak dikenakan. MOC divariasi melalui memorandum variasi pajakan ('MOVC') dan kadar faedah tidak terpakai. Pada kira-kira 2011, anak-anak lelaki plaintif menemui defendan-defendan untuk menyelesaikan hutang dan melepaskan tanah tersebut daripada pajakan. Defendan-defendan menunjukkan penyata dengan jumlah tebusan sebanyak RM4,079,956.88. Plaintif menegaskan bahawa jumlah yang perlu dibayar semula ialah RM1,430,000 dan seterusnya memfailkan saman pemula ('SP') di Mahkamah Tinggi bagi satu deklarasi jumlah tersebut. Dalam menentang SP plaintif, defendan-defendan menuntut balas bahawa (i) pinjaman tersebut tidak dikenakan faedah jika dibayar dalam masa setahun; (ii) selepas tempoh satu tahun tersebut, faedah perlu dibayar, seperti yang disetujui oleh plaintif sendiri dalam satu dokumen berasingan ('surat'); (iii) jumlah yang dinyatakan dalam MOVC adalah pinjaman yang diberi untuk melepaskan pajakan terdahulu pada tanah serta jumlah pelbagai pinjaman yang pernah diberi kepada plaintif dan suaminya pada tahun-tahun terdahulu; dan (iv) faedah tidak dinyatakan dalam MOC dan MOVC kerana cukai pendapatan perlu dibayar dalam faedah walaupun jumlahnya belum diterima. Sebaliknya, plaintif menghujahkan bahawa (i) bahagian bertanda 'Interest Rate' dalam MOVC tertera dengan perkataan-perkataan 'Not Applicable'; dan (ii) peninggalan apa-apa rujukan pada faedah dalam MOC dan MOVC adalah satu pengelakkan cukai dan menjadikan kontrak tersebut tidak sah. Hakim Mahkamah Tinggi membenarkan permohonan plaintif dan menolak tuntutan balas defendan bagi bayaran faedah. Memetik s. 91 Akta Keterangan 1950, Hakim Mahkamah Tinggi menyatakan bahawa (i) dalam memutuskan terma-terma dalam kontrak antara pihak-pihak, mahkamah hanya boleh merujuk terma-terma yang terkandung dalam MOC dan MOVC; (ii) surat tersebut tidak boleh dijadikan sandaran oleh defendan-defendan untuk membuktikan plaintif bersetuju dengan bayaran faedah; dan (iii) dengan kegagalan menyatakan apa-apa faedah dalam MOC dan MOVC, defendan-defendan mengelak cukai dan ini menjadikan kontrak tersebut tidak sah. Maka timbul rayuan ini. Isu-isu berbangkit bagi pertimbangan

mahkamah adalah (i) sama ada hanya MOC dan MOVC dokumen-dokumen yang boleh diterima masuk; (ii) sama ada perjanjian sah; dan (iii) bila faedah terhutang dan perlu dibayar.

Diputuskan (memerintahkan sewajarnya):

(1) Perkataan-perkataan dalam MOVC sekadar mencerminkan fakta bahawa MOVC hanya memvariasi tempoh bayaran semula jumlah pinjaman yang dinyatakan dalam MOC. Terma-terma lain dalam MOC kekal berkuat kuasa. Surat tersebut boleh diterima masuk untuk menunjukkan terdapat perjanjian membayar faedah. Meneliti MOC bersama-sama surat tersebut, jelas bahawa perjanjian antara pihak-pihak sebenarnya terkandung dalam surat tersebut dan juga MOC. Dalam kata lain, MOC tidak membentuk keseluruhan perjanjian yang dicapai oleh pihak-pihak. Perjanjian dalam surat untuk membayar faedah kekal berkuat kuasa. Oleh itu, semua dokumen, khususnya MOC, MVOC dan surat tersebut, sah.

(2) Defendan bukannya ingin mengelak bayaran cukai itu sendiri atau sama sekali tetapi mereka ingin mengelak membayar cukai pendapatan yang belum diterima. Kontrak antara pihak-pihak, seperti yang terkandung dalam ketiga-tiga dokumen, tidak tercemar dengan ketaksahan hingga membangkitkan operasi s. 24 Akta Kontrak 1950. Terdapat kontrak sah antara pihak-pihak bagi bayaran faedah sebanyak 10% setahun pada pinjaman, seperti yang dinyatakan oleh surat tersebut.

(3) Mahkamah tidak boleh menentukan tarikh pelepasan. Hanya apabila plaintif memfailkan SP bagi deklarasi jumlah tebusan, yang defendan-defendan menuntut balas, memohon perintah bagi bayaran semua faedah selagi pajakan belum dilepaskan oleh bayaran jumlah prinsipal dan faedah serta kos. Apabila rayuan bermula di mahkamah, pajakan telah pun dilepaskan melalui bayaran jumlah prinsipal. Yang belum dibayar cuma faedah. Perintah Mahkamah Tinggi divariasi sekadar berkenaan faedah.

Case(s) referred to:

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(dist)***

Legislation referred to:

Contracts Act 1950, s. 24
Evidence Act 1950, s. 91

For the appellants - Arthur Lee Cheng Chuan & Parameswary Shanmugam; M/s Arthur Lee, Lin & Go
For the respondent - Paul Tang; M/s Tan, Yap & Tang Advocs

[Editor's note: Appeal from High Court, Kuching; Originating Summons No: KCH-24-34-3-2012 (Varied).]

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This was an appeal against the decision of the High Court at Kuching, Sarawak, which allowed the plaintiff's application made by way of originating summons ("OS") for a declaration that the plaintiff was entitled to discharge the charge over the plaintiff's properties charged to the defendants, upon payment to the defendants of the sum of RM1,430,000 only.

[2] The parties are referred to in this judgment as they were in the High Court.

[3] The original plaintiff had, prior to the High Court decision, passed away and her sons, who were appointed as co-executors and trustees of her estate, had been substituted in her stead. In this judgment, references to the "plaintiff" are references to the original plaintiff or to the subsequent plaintiffs, collectively, as the context requires.

Brief Background Facts

[4] The original plaintiff was the sister of the first defendant. The second defendant is the first defendant's daughter and the third defendant is the first defendant's son-in-law.

[5] The plaintiff obtained a loan of RM1,430,000 from the defendants ("loan"). As security for the loan, she executed a memorandum of charge over two pieces of land ("land") on 27 October 2000. The memorandum of charge was registered at the Kuching Land Registry Office on 31 October 2000. Under the memorandum of charge, the loan was to be repaid within one year from the date of execution of the charge. No interest was charged for that loan.

[6] The memorandum of charge was varied by way of a memorandum of variation of charge dated 30 November 2007 with the term of repayment extended to 31 October 2012. The section marked "interest rate" had the words "not applicable" typed in. This was pursuant to a request by the plaintiff in her letter dated 23 June 2005 for extension of time to repay her loan.

[7] Sometime in 2011, the plaintiff's sons approached the defendants with a view to settling the loan and discharging the charge over the land. They were however shown a statement by the defendants claiming a redemption sum of RM4,079,956.88.

[8] The plaintiff insisted that the amount to be repaid was only RM1,430,000, and filed the OS for a declaration to that effect.

In The High Court

[9] The defendants filed affidavits in opposition claiming that the loan was only interest-free so long as it was paid within one year. When that period of one year was exceeded, interest was payable as agreed to by the plaintiff herself in a separate document. This was the letter dated 30 September 2000 (exh. CKS1 exhibited in the affidavit in opposition affirmed by the first defendant).

[10] According to the defendants, the amount stated in the memorandum of charge was the loan given to discharge an earlier charge on the land as well as the amount of various loans given to the plaintiff and her husband over the years.

[11] The defendants also claimed that interest was not stated in the memorandum of charge as well as in the subsequent memorandum of variation of charge as they believed that income tax would be payable on the interest even though the amount had not been received yet.

[12] The plaintiff however pointed out that the memorandum of variation of charge with the words "not applicable" showed that the loan was interest-free.

[13] The plaintiff also submitted that the omission of any reference to interest in the memorandum of charge and the memorandum of variation of charge constituted tax evasion and made the contract an illegal contract.

[14] The learned High Court Judge, citing s. 91 of the Evidence Act 1950, held that in determining the terms of the contract between the parties, the court was permitted to have regard only to the terms contained in the memorandum of charge and the memorandum of variation of charge. Therefore the letter dated 30 September 2000 could not be relied upon by the defendants to prove that the plaintiff had agreed to the payment of interest as claimed by the defendants.

[15] The learned High Court Judge also held that by omitting any mention of interest in the memorandum of charge and the memorandum of variation of charge, the defendants were avoiding tax and that rendered the contract illegal.

[16] The High Court allowed the plaintiff's application and dismissed the defendants' counterclaim for the payment of interest.

[17] The defendants appealed to this court.

In The Court Of Appeal

[18] We were informed by learned counsel for the defendants that the amount in the memorandum of charge had been settled in full and the charge over the land had been discharged.

[19] Learned counsel for the defendants informed this court that the only issue before this court was the issue of interest on the loan amount of RM1,430,000. That interest, according to learned counsel, was being held by the plaintiff's solicitors, as stakeholders.

[20] Learned counsel for the plaintiff submitted that the defendants were relying on an earlier letter to claim interest. But it had to be noted that the memorandum of variation of charge did not vary the memorandum of charge so as to reflect the agreement in regard to the letter dated 30 September 2000.

[21] Learned counsel for the defendants submitted that while there was no interest mentioned in the memorandum of charge, there was the admission in the letter dated 30 September 2000 and the statement of account that was given some time in October 2000 that clearly showed that interest was payable.

Analysis

Whether The Memorandum Of Charge And Memorandum Of Variation Of Charge Were The Only Documents Admissible

[22] It was not disputed that there was an admission by the plaintiff that interest of 10% was to be paid on the loan. That admission was contained in the letter dated 30 September 2000.

[23] It was also not in dispute that the amount of the loan was admitted by the plaintiff to be RM1,430,000.

[24] It was further not in dispute that the memorandum of charge did not contain any reference to any interest, while in the memorandum of variation of charge, in the section marked "interest rate", the words "not applicable" had been typed.

[25] It was quite clear in the memorandum of charge that the loan was to be paid within one year. It was also quite clear from para. 3 of the agreement of the parties in the memorandum that if the loan was not paid in the period stated in the memorandum of charge, the chargee was entitled to exercise "all rights, powers and remedies provided to a chargee under the Land Code" of Sarawak.

[26] As mentioned above, it was not in dispute that the loan was not paid, leading to the plaintiff's letter dated 23 June 2005 requesting for extension of time to repay the loan. This in turn led to the execution of the memorandum of variation of charge dated 30 November 2007.

[27] We noted that the letter dated 30 September 2000 was in two parts. In the first part, the plaintiff acknowledged that the defendants gave her the loan and in consideration for that loan she agreed to allow the defendants to register a charge over the land.

[28] In the second part of the letter, the plaintiff promised to pay the loan within one year, failing which she agreed to pay interest of 10% per annum over the unpaid amount.

[29] Pursuant to the request by the plaintiff, the period of repayment of one year was extended until 31 October 2012 under the memorandum of variation of charge.

[30] Having examined carefully the plaintiff's letter of 23 June 2005 and the memorandum of variation of charge, we were of the considered view that the words "not applicable" in the memorandum of variation of charge merely reflected the fact that the memorandum of variation of charge was only varying the period for the repayment of the loan amount stated in the memorandum of charge. The other terms of the memorandum of charge remained in force.

[31] Reverting back to the question of whether the letter dated 30 September 2000 was admissible to show that there was an agreement to pay interest, our considered opinion was that it was.

[32] We were mindful of the provisions of s. 91 of the Evidence Act 1950.

[33] Reading the memorandum of charge and the letter dated 30 September 2000 together, it would appear that the agreement between the parties was in fact contained in that letter as well as in the memorandum of charge. In other words, the memorandum of charge did not constitute the totality of the agreement reached by the parties.

[34] As mentioned above, the letter dated 30 September 2000 contained two agreements. In consideration for the loan which was to be paid within one year, the plaintiff agreed to have a charge registered over the properties. This led to the memorandum of charge being registered.

[35] The second part of the letter dated 30 September 2000 in which the plaintiff agreed to pay interest appeared to us (as learned counsel for the defendants in his own manner attempted to explain to us) to be the consideration for the defendants not pursuing their rights under the charge should the loan be not repaid within one year. Hence no action under the charge and the Land Code was taken by the defendants upon the expiry of the period of one year.

[36] The memorandum of charge was varied - but only in relation to the period of payment.

[37] We agreed with learned counsel for the defendants that the agreement in the letter dated 30 September 2000 to pay interest continued to be in force.

[38] In those circumstances, we disagreed with the learned High Court Judge who was of the view that s. 91 of the Evidence Act 1950 applied to this case. Section 91 reads as follows:

> 91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
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> ...
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> Explanation 1 -- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.
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> ...
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> ILLUSTRATIONS
>
> (a) If a contract is contained in several letters, all the letters in which it is contained must be proved.

[39] In our considered view, as the agreements between the parties were comprised in the letter dated 30 September 2000 as well as the memorandum of charge and the memorandum of variation of charge, all the documents were admissible.

Whether The Agreement Was Illegal

[40] The learned High Court Judge, in dismissing the counterclaim for the payment of interest, was also of the view that the contract between the parties in relation to the interest was illegal as the defendants omitted any mention of interest in the memorandum of charge and memorandum of variation of charge in order to avoid having to pay tax on the interest.

[41] However, the defendants' explanation was this: it was not that they wanted to avoid payment of tax *per se* or altogether, but they wanted to avoid paying tax on income (in this case the interest) which had not been received yet. It was not in dispute that in fact not a single sen of interest was received by the defendants leading to their counterclaim for the interest in this case.

A The facts of this case can therefore be distinguished from the facts in the case of *Lim Kar Bee v. Duoforties Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281, relied upon by the learned High Court Judge.

B **[42]** In *Lim Kar Bee*, there was a deliberate scheme drawn up by a tax consultant for the purpose of avoiding the payment of estate duty. The scheme involved the incorporation of two companies, and the issuance of ordinary shares which would later be converted into preference shares. The conversion was a necessary step in the scheme to ensure that ultimately no estate duty was payable as the value of each of the preference shares would C remain at the par value of RM1 and thus the total value of the shares for purposes of estate duty would be below the threshold which would make estate duty payable. The scheme was elaborately drawn up to make it appear as authentic as possible so that it would not be challenged by the Inland Revenue Department.

D **[43]** We were therefore of the considered view that the contract between the parties as embodied in the three documents we have discussed above was not tainted with illegality so as to attract the operation of s. 24 of the Contracts Act 1950.

E **Conclusion**

[44] There was therefore, in our considered view, a valid contract between the parties for the payment of interest of 10% per annum on the loan as evidenced by the letter dated 30 September 2000.

When Was Interest Due And Payable?

F **[45]** The agreement between the plaintiff and the defendants was that for the initial period of one year the loan was interest-free. The relevant paragraph in the letter dated 30 September 2000 stated the following:

> I promise to repay your loan within one (1) year **failing which** I agree to G pay you interest at the rate of ten per centum (10%) per annum on the unpaid sum of the loan until full and final settlement thereof. (emphasis added)

[46] It must be noted that by the memorandum of variation of charge, the period for payment of the loan was extended from the initial one year to H 31 October 2012.

[47] We were of the considered view that when the defendants agreed to the variation of the period of repayment of the loan from the period of one year to the period ending on 31 October 2012, the defendants effectively agreed to the loan being interest-free for the duration of that latter period.

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[48] The interest therefore, in our considered view, only became payable after the expiry of the extended period.

[49] However, under para. 2 of the memorandum of charge, the chargor agreed that no dealing would be registered against the land. Under para. 3, if the chargor committed or "threatens to commit" a breach of any of the terms of the charge, the full sum of the loan became immediately due and repayable.

[50] What triggered the defendants' demand for the repayment of the loan and interest on the loan before the expiry of the extended period was the sale and purchase agreement entered into by the plaintiff for the sale of the land, which the defendants became aware of when the plaintiff sought to have the charge discharged.

[51] The defendants demanded payment of the loan as well as interest on the loan from the date of expiry of the initial period of one year.

[52] We noted that even after the defendants knew of the sale and purchase agreement, the defendants did not make any move to exercise their rights under the charge and the Land Code.

[53] It was only when the plaintiff filed this OS for a declaration of the amount of the redemption sum that the defendants counterclaimed as can be seen from para. 19 of the first defendant's affidavit in opposition.

[54] However, para. 19 sought an order for the repayment of interest "for as long as the charge is not discharged by payment of principal sum and interest and costs". By the time this appeal came before us, the charge was already discharged by the payment of the principal sum. What was left unpaid was the interest.

[55] We were unable to ascertain the date of discharge.

Decision

[56] Based on the considerations set out above, we allowed the defendants' appeal. The loan sum of RM1,430,000 was to be repaid with interest at the rate of 10% per annum. As the principal sum of RM1,430,000 had been repaid and only the interest portion was the subject matter of the appeal before this court, the High Court order was varied only in relation to the interest.

[57] We ordered that the interest on the loan of RM 1,430,000 be paid over to the defendants from the sum held by the solicitors for the plaintiff, in full and final settlement of the whole claim.

A **[58]** We also ordered that the interest of 10% per annum on the loan of RM1,430,000 be calculated from the date of filing of the first defendant's affidavit in opposition, in view of what we have set out in paras. 45 until 55 above.

B **[59]** In view of the relationship of the parties, we made no order as to costs and ordered the deposit to be refunded.

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